

Mar 26, 2018

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

TYLER JAMES THOMAS  
LANKFORD,

No. 2:16-cv-00377-SMJ

Plaintiff,

v.

**ORDER DENYING PLAINTIFF'S  
MOTION FOR  
RECONSIDERATION**

CITY OF PULLMAN; COUNTY OF  
WHITMAN; STATE OF  
WASHINGTON; OFFICER JOSHUA  
BRAY; OFFICER BRIAN  
CHAMBERLAIN; DETECTIVE  
TODD DOW; OFFICER ALEX  
GORDON; SERGEANT SAM  
SOREM; OFFICER GREG  
UMBRIGHT; OFFICER JUSTIN  
DEROSIER; OFFICER MIKE  
PETLOVANY; and DOES I-X,

Defendants.

Before the Court, without oral argument, is Plaintiff Tyler Lankford's Motion for Reconsideration, ECF No. 164. Lankford filed this action against the above-captioned defendants (collectively, "Pullman Defendants") alleging violation of several constitutional and statutory rights. Pullman Defendants moved for summary judgment on Lankford's claims, ECF No. 65, and the Court granted the motion in part and denied it in part. As relevant to this motion, the Court

1 granted summary judgment to the Pullman Defendants on Lankford's malicious  
2 prosecution claims. Lankford now moves for reconsideration on the malicious  
3 prosecution claim. ECF No. 102.

4 “[A] motion for reconsideration should not be granted, absent highly  
5 unusual circumstances, unless the district court is presented with newly  
6 discovered evidence, committed clear error, or if there is an intervening change in  
7 the controlling law.” *389 Orange St. Partners v. Arnold*, 179 F.3d 656, 665 (9th  
8 Cir. 1999).

9 Lankford argues that (1) questions of fact remain regarding whether  
10 probable cause existed to support the possession of a controlled substance charge,  
11 and (2) the Court did not properly address Lankford’s claim for malicious  
12 prosecution on the felony harassment charge.

13 With respect to the possession of a controlled substance charge, Lankford  
14 argues that questions of fact existed as to whether probable cause existed to  
15 initiate or pursue the claim. However, the Court has already determined that  
16 probable cause existed for that claim, *see* ECF No. 163, and Lankford has not  
17 produced any additional evidence to warrant reconsideration. Even if Lankford  
18 could establish a lack of probable cause, his claim still suffers from the same  
19 deficiency identified below—namely, he can point to no evidence in the record  
20

1 from which a reasonable juror could infer that any of the named defendants acted  
2 with malice.

3 Lankford further argues that the Court erred in granting summary judgment  
4 on his malicious prosecution claim for the charge of felony harassment with a gun  
5 enhancement. When a plaintiff asserts a claim for malicious prosecution, the  
6 Court must analyze each charged claim independently. “[P]robable cause as to one  
7 charge will not bar a malicious prosecution claim based on a second, distinct  
8 charge as to which probable cause was lacking.” *See Holmes v. Vill. of Hoffman*  
9 *Estate*, 511 , 511 673, 682 (7th Cir. 2007). While Lankford is correct that the  
10 Court’s prior order did not clearly distinguish between the drug and felony  
11 harassment claims, the Court’s decision remains unchanged that summary  
12 judgment for the Pullman Defendants is appropriate on both claims.

13 In the Ninth Circuit, the general rule is that a claim of malicious prosecution  
14 is not cognizable under 42 U.S. § 1983 if process is available within the state  
15 judicial system to provide a remedy. *Usher v. City of L.A.*, 828 F.2d 556, 561 (9th  
16 Cir. 1987). However, “an exception exists to the general rule when a malicious  
17 prosecution is conducted with the intent to deprive a person of equal protection of  
18 the laws or is otherwise intended to subject a person to a denial of constitutional  
19 rights.” *Id.* at 562 (quoting *Bretz v. Kelman*, 773 F.2d 1026, 1031 (9th Cir. 1985)  
20 (en banc)).

1 To maintain an action for malicious prosecution, a plaintiff must show that  
2 (1) the prosecution was instituted or continued by the defendant; (2) there was  
3 want of probable cause for the institution or continuation of the prosecution; (3)  
4 the proceedings were instituted or continued through malice; (4) the proceedings  
5 terminated on the merits in favor of the plaintiff or were abandoned; and (5) the  
6 plaintiff suffered injury or damage as a result of the prosecution. *Hanson v. City of*  
7 *Snohomish*, 852 P.2d 295, 298 (Wash. 1983); *Peasley v. Puget Sound Tug &*  
8 *Barge Co.*, 125 P.2d 681, 687–88 (Wash. 1942). Of these five elements, malice  
9 and want of probable cause constitute the “gist of the action.” *Peasley*, 125 P.2d at  
10 688.

11 The burden of proof on both elements rests with the plaintiff. *Id.* Where, as  
12 here, the plaintiff successfully establishes want of probable cause for a  
13 defendant’s institution of criminal proceedings against him, that fact alone is  
14 insufficient to establish a prima facie case for malicious prosecution. The plaintiff  
15 must go further on the part of the defendant, “for want of probable cause without  
16 malice is of no avail.” *Id.* at 689.

17 Here, Lankford has established that officers lacked probable cause to  
18 suspect him of the crime of felony harassment against Mikaela Marlow. However,  
19 Lankford has produced no evidence from which a reasonable juror could infer  
20 malice. In his motion for reconsideration, Lankford argues that malice is not an

1 element of a federal malicious prosecution claim, but cites no authority for this  
2 position. The Ninth Circuit has repeatedly recognized that a malicious prosecution  
3 claim requires a showing of malice. *See, e.g., Usher*, 828 F.2d at 561 (recognizing  
4 § 1983 claim requires a showing of “malicious motivation”); *Freeman v. City of*  
5 *Santa Ana*, 68 F.3d 1180, 1189 (9th Cir. 1995) (noting that, to prevail on a § 1983  
6 malicious prosecution claim, the plaintiff must show “that the defendants  
7 prosecuted her with malice and without probable cause”).

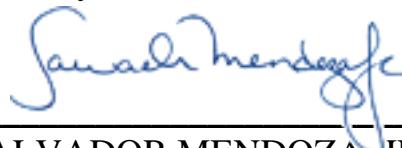
8 Accordingly, **IT IS HEREBY ORDERED:**

9 **1.** Plaintiff’s Motion for Reconsideration, **ECF No. 164**, is **DENIED**.

10 **IT IS SO ORDERED.** The Clerk’s Office is directed to enter this Order

11 and provide copies to all counsel.

12 **DATED** this 26<sup>th</sup> day of March 2018.

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 SALVADOR MENDOZA, JR.  
United States District Judge